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instrument, might not be binding in any case where the negotiations were wholly oral.¹⁴ The only reason for such a distinction is that the parties are more likely to want a formal document where the contract has been verbal; and so it might be said that in such a case there is a presumption that the formal instrument was intended as a condition.

ESTOPPEL WITHOUT MISREPRESENTATION.—Although estoppel was regarded originally as odious because it prevented a person from asserting and proving the real truth or what he claimed to be the truth, its range has been widened steadily by the courts, quick to observe in its principles the possibilities of convenient short cuts to justice.¹ Three main divisions of estoppel are now generally recognized: estoppel by record, by deed, and *in pais*.² This last class is sub-divided along lines bearing a striking resemblance to those by which the several varieties of contracts are differentiated. For just as true contracts arise from the intent of the parties, either as expressed or as inferred from their actual conduct, so estoppels may originate in agreements, either implied in fact or express.³ And as the law creates quasi-contractual obligations to frustrate injustice, regardless of the intent of the parties, just so does it raise estoppels to prevent a person from taking unfair advantages, either by overriding contracts whose performance by the other party has already awarded him permissive possession of something, or by utilizing his own misrepresentations.⁴

An excellent example of estoppel raised by law, is afforded by a recent New York decision, *Farnsworth v. Boro Oil & Gas Co.* (1915) 216 N. Y. 40, which also illustrates the tendency of the courts to enlarge the scope of estoppel to work out substantial justice. Natural gas companies organized under the Business Corporation Law are required to obtain the consent of the Commissioner of Highways,⁵ now Town Commissioner,⁶ before invading the highways of towns with pipe lines. Similar corporations organized under the Transportation Corporation Law must likewise obtain official permission, but from the Town Board.⁷ The defendant was formed under the Business Corporation Law yet applied to the Town Board, who granted the corporation permission to lay its pipes, but fixed, as a condition of their grant, the maximum price the company might charge consumers.⁸ After a

¹⁴See also a dictum to the same effect in *Sanders v. Pottlitzer Bros. Fruit Co.* (1894) 144 N. Y. 209.

¹Bigelow, *Estoppel* (6th ed.) 5-6.

²Bigelow, *Estoppel* (6th ed.) 5; Cababe, *Estoppel*, 1-5.

³*M'Cance v. London & N. W. Ry.* (1861) 7 H. & N. 477; *Hoeger v. Chicago M. & St. P. Ry.* (1885) 63 Wis. 100; Cababe, *Estoppel*, 6-12; Bigelow, *Estoppel* (6th ed.) 495, 496.

⁴*McStea v. Matthews* (1872) 50 N. Y. 166; *Tilyou v. Reynolds* (1888) 108 N. Y. 558; Cababe, *Estoppel*, 12-44, 45-47; Bigelow, *Estoppel* (6th ed.) 491, Chap. XVII, 602-604.

⁵N. Y. Laws of 1875, c. 611; Laws of 1889, c. 422, § 2.

⁶N. Y. Highway Law, L. 1909, c. 30, § 43.

⁷N. Y. Laws of 1909, c. 219, § 61.

⁸It is generally held that municipal authorities may as a condition of granting a franchise to a public service corporation, fix reasonable rates. 3 Dillon, *Municipal Corporations* (5th ed.) 2144; *Simons Sons Co. v. Mary-*

subsequent fruitless application to the Town Board for permission to raise the rate, the defendant increased the price of its gas without the Board's consent. And when sued by the plaintiff as a consumer,⁹ it set up want of authority in the Town Board to grant the company the right to use the highways and consequently to set rates. It was held, two justices dissenting, that by entering and remaining in possession under color of the Board's permission the defendant estopped itself from denying the validity of the Board's consent.

It is said occasionally that there can be no true estoppel unless there has been some misrepresentation,¹⁰ and the dissenting judges in the principal case found it impossible to agree with the majority for want of an adequate act or omission on the part of the defendant. The prevailing opinion, however, seized upon the analogy of the relationship between the corporation and the Town Board, to those existing between the tenant and his landlord and the licensee and licensor of a patent right. Both courts and text-writers apply the term estoppel freely to the restrictions and prohibitions of litigation between persons bound together by these relationships and also by the relationship of bailor and bailee. Many writers on the subject of estoppel separate these estoppels from those grounded upon mere misrepresentations, and classify these two groups under entirely distinct headings.¹¹ Moreover, the question of misrepresentation seems to be quite ignored by the decisions establishing estoppels between landlord and tenant, bailor and bailee, and patent-licensor and licensee.¹² Perhaps it is cleaving closer to the old time conception of the word to insist upon the presence of a misrepresentation before admitting the existence of a technical estoppel, but such insistence is confusing, in view of the wider scope now given the term by the courts, to meet the requirements of modern times.¹³

land Tel. Co. (1904) 99 Md. 141; *People v. Barnard* (1888) 110 N. Y. 548, 557. But see *Wright v. Glen Telephone Co.* (N. Y. 1906) 112 App. Div. 745.

⁹*Cf. Pond v. New Rochelle Water Co.* (1906) 183 N. Y. 330.

¹⁰See for example, 14 *Columbia Law Rev.*, 184-185. But see Bigelow, *Estoppel* (6th ed.) 491.

¹¹Bigelow, for example, although classifying both the "relationship estoppels" and those arising from misrepresentation as varieties of estoppel *in pais*, draws a sharp line between these two groups and makes them mutually exclusive under the respective headings of "estoppel by contract" and "estoppel by conduct." Bigelow, *Estoppel* (6th ed.) Chaps. XIII, XVII and XVIII. Ewart excludes these "relationship" estoppels "by contract" expressly from his book, *Estoppel by Misrepresentation*, page 2. According to Cababe, the relationship estoppels are grounded upon agreements "implied from the nature of the transaction itself" while "estoppel by misrepresentation" is wholly different, and is based upon misleading acts or words, or deceit. Cababe, *Estoppel*, 12-44, 45-47. And see Herman, *Estoppel*, 334, 358.

¹²See for example: landlord & tenant, *Holmes v. Kennedy* (Conn. 1775) 1 Root 77; *Ingraham v. Baldwin* (1853) 9 N. Y. 45; *Binney v. Chapman* (1827) 22 Mass. 124; bailor & bailee, *Simpson v. Wrenn* (1869) 50 Ill. 222; *Stephens v. Vaughan* (1830) 27 Ky. 206; *Osgood v. Nichols* (1855) 71 Mass. 420; *Sinclair v. Murphy* (1866) 14 Mich. 392; patent—licensor and licensee, *Consolidated Middlings Purifier Co. v. Guilden* (C. C. 1881) 9 Fed. 155; *Time Telegraph Co. v. Himmer* (C. C. 1884) 19 Fed. 322. Indeed, the estoppel existing in the patent cases has been declared expressly to be different from estoppel arising from misrepresentation. *Babcock v. Clarkson* (C. C. A. 1894) 63 Fed. 607.

¹³See Bigelow, *Estoppel* (6th ed.) 491.

Nor does such extension seem unjustifiable. It is true that the courts, when they assign any reason for their action in raising estoppels from the various relationships discussed, other than that of mere binding authority, usually retreat to the sheltering bulwarks of public policy.¹⁴ But the rule of public policy invoked seems to be nothing more formidable or difficult to comprehend than the ancient but honorable maxim that "no man shall take advantage of his own wrong,"¹⁵ which is admitted by some to be at the bottom of estoppel by misrepresentation.¹⁶ Viewed in this light, the decision in the principal case seems proper, even though a misrepresentation is difficult to find. The defendant company after utilizing the permission of the Town Board to make money from the inhabitants of the town, now proposes to dictate its own terms to the public to whom it supplies a necessary commodity, and to do so without surrendering the privileges it obtained. Clearly this is an attempt to take advantage of its own wrong, and the court appears to be wholly justified in preventing this, even if it be necessary in doing so, to overstep the old technical confines of estoppel and to strain somewhat in the search for a pertinent analogy.¹⁷

RELIGIOUS LIBERTY IN THE UNITED STATES.—Not only does the Federal Constitution provide that "no religious test shall ever be required as a qualification to any office or public trust under the United States"¹ and that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"² but the State government, to which it will be observed the above limitations do not apply, are more strictly constrained touching liberty of conscience, by the constitutions of the various commonwealths. Some of these add to the federal guaranties, provisions against discrimination or preference between sects,³ and prohibit the disqualification of witnesses because of religious belief.⁴ However far such a result may have been from the contemplations of those who framed our fundamental law, it seems clear that the spirit of American government, as exemplified in the Constitution, requires at least in theory, perfect equality before the law, of every sect of religion and every gradation of agnosticism and atheism. The conception of the monarch as the

¹⁴*Bertram v. Cook* (1875) 32 Mich. 518; *Babcock v. Clarkson*, *supra*; see *Blight's Lessee v. Rochester* (1822) 20 U. S. 535, 547.

¹⁵It seems proper to sustain these modern estoppels on this ground, even though the estoppel between landlord and tenant had its origin in estoppel by deed or by one of the old formal estoppels *in pais*. Bigelow, *Estoppel* (6th ed.) 547; Cababe, *Estoppel*, 2-3.

¹⁶Herman, *Estoppel*, 336.

¹⁷*Cf. Chicago General Ry. v. Chicago* (1898) 176 Ill. 253; *People v. Suburban R. R.* (1899) 178 Ill. 594, 606, 607; *Rutherford v. Hudson River Traction Co.* (1906) 73 N. J. L. 227, 235; and *Village of Fredonia v. Fredonia* (App. Div., 2nd Dep., 1915) 155 N. Y. S. 212, where estoppel of this nature was invoked to protect a gas company against persecution by the municipality it served. But see *Mayor of Worcester v. Worcester Con. St. Ry.* (1906) 192 Mass. 106, 111-112.

¹U. S. Const., Art. VI, § 3.

²U. S. Const., Amendment I.

³N. Y. Const., Art. I, § 3; La. Const., Art. 53.

⁴N. Y. Const., Art. I, § 3.